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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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11 WILLIE E. TATUM,

No. C-08-0814 TEH (PR)

12 Petitioner,

13 v.

ORDER DENYING PETITION FOR WRIT  
OF HABEAS CORPUS

14 BEN CURRY, Warden

15 Respondent.  
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18 Pro se Petitioner Willie E. Tatum, a state prisoner  
19 incarcerated at the California Training Facility in Soledad,  
20 California, seeks a writ of habeas corpus under 28 U.S.C. § 2254  
21 challenging the California Board of Parole Hearings' ("BPH")  
22 September 15, 2005 decision to deny him parole, which, for the  
23 reasons that follow, the Court denies.  
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25 I

26 The facts of the crimes, as recited by BPH without  
27 objection from Petitioner, are as follows:  
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1 On May 21, 1982, at about 2:00 A.M., female  
2 victim[s] Becker and Simon . . . were forced off  
3 the road by [a] van. [Petitioner] and [another  
4 man] exited the van and approached the  
5 victim[s]' car. [Three more men remained in  
6 the van.] [Petitioner] was armed with a loaded  
7 revolver and forced his way into the passenger  
8 side of the victim[s]' vehicle. [One of the  
9 other men] threatened the victims with a knife  
10 and also forced his way into the victim[s]'  
11 vehicle. The victims screamed. [Both the  
12 brother and boyfriend of one of the victims]  
13 heard the scream and went out to investigate.  
14 [Petitioner] pointed the revolver directly at  
15 the m[en] and told them to get back. The two  
16 men complied with [Petitioner's] order. The  
17 victims were forced to drive away from their  
18 location. [Petitioner] ordered Becker to follow  
19 the van. They drove a short distance during  
20 which [Petitioner] and [a co-perpetrator] robbed  
the victims of their jewelry. They then ordered  
the victims out of their car and into the  
waiting van. Inside the van, [Petitioner]  
ordered the victims to remove their clothes.  
[One of the co-perpetrators] attempted to  
unbutton [] Simon's pants. He stopped when he  
was told to wait until they got on the freeway.  
The police had been contacted by the victim's  
boyfriend, and the van was identified. The  
police spotted the van and a chase ensued. The  
chase lasted a short time. The chase culminated  
when the van crashed into a tree. The five  
defendants then attempted to escape by running  
out of the van. [Petitioner] and [one of the co-  
perpetrators] were arrested immediately at the  
scene. [The] remaining [co-perpetrators] were  
arrested later near the scene of the crashed  
van.

21 Doc. #4-1 at 43-44.

22 In 1982, Petitioner was sentenced to seven years to life  
23 in state prison following his guilty plea to two counts of  
24 kidnapping for the purpose robbery and an attached deadly weapon  
25 enhancement. Doc. #4-1 at 36; Doc. #4-3 at 2. His minimum eligible  
26 parole date was February 28, 1989. Doc. #4-1 at 36.

1           On September 15, 2005, Petitioner appeared before BPH for  
2 his twelfth parole suitability hearing. Doc. #1 at 9. Before the  
3 hearing concluded, Petitioner, who apparently exhibited disruptive  
4 behavior at his prior parole suitability hearings, became  
5 "combative" and "argumentative" and was removed. Doc. #4-2 at 26-  
6 27. At the conclusion of the hearing, BPH found Petitioner "was not  
7 yet suitable for parole and would pose an unreasonable risk of  
8 danger to society or a threat to public safety if released from  
9 prison." Doc. #4-2 at 40. BPH cited several reasons to support its  
10 decision, including: (1) the "very callous" nature of the  
11 commitment offense; (2) that there were multiple victims who were  
12 subject to Petitioner's "abusive" threats; (3) Petitioner's  
13 "unstable" social history, including his history of domestic  
14 violence; and (4) his "inability to control his temper, as once  
15 again was evidenced today at this hearing." Id. at 40-42, 44.  
16 Petitioner's parole was deferred for two years. Id. at 40.

17           Petitioner unsuccessfully challenged BPH's decision in the  
18 state superior and appellate courts. Doc. #4-3 at 2-4; Doc. #4-5 at  
19 2. On December 12, 2007, the California Supreme Court summarily  
20 denied Petitioner's Petition for Review. Doc. #4-7 at 2. This  
21 federal Petition for a Writ of Habeas Corpus followed. Doc. #1.

22           Per order filed on July 2, 2008, the Court found  
23 Petitioner's claim that BPH violated his due process rights, when  
24 liberally construed, colorable under § 2254, and ordered Respondent  
25 to show cause why a writ of habeas corpus should not be granted.  
26 Doc. #3. Respondent has filed an Answer and Petitioner has filed a  
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1 Traverse. Doc. ## 4 & 5.

3 II

4 The Antiterrorism and Effective Death Penalty Act of 1996  
5 ("AEDPA"), codified under 28 U.S.C. § 2254, provides "the exclusive  
6 vehicle for a habeas petition by a state prisoner in custody  
7 pursuant to a state court judgment, even when the petitioner is not  
8 challenging his underlying state court conviction." White v.  
9 Lambert, 370 F.3d 1002, 1009-10 (9th Cir. 2004). Under AEDPA, this  
10 Court may entertain a petition for habeas relief on behalf of a  
11 California state inmate "only on the ground that he is in custody in  
12 violation of the Constitution or laws or treaties of the United  
13 States." 28 U.S.C. § 2254(a).

14 The writ may not be granted unless the state court's  
15 adjudication of any claim on the merits: "(1) resulted in a  
16 decision that was contrary to, or involved an unreasonable  
17 application of, clearly established Federal law, as determined by  
18 the Supreme Court of the United States; or (2) resulted in a  
19 decision that was based on an unreasonable determination of the  
20 facts in light of the evidence presented in the State court  
21 proceeding." 28 U.S.C. § 2254(d). Under this deferential standard,  
22 federal habeas relief will not be granted "simply because [this]  
23 court concludes in its independent judgment that the relevant  
24 state-court decision applied clearly established federal law  
25 erroneously or incorrectly. Rather, that application must also be  
26 unreasonable." Williams v. Taylor, 529 U.S. 362, 411 (2000).

1           While circuit law may provide persuasive authority in  
2 determining whether the state court made an unreasonable application  
3 of Supreme Court precedent, the only definitive source of clearly  
4 established federal law under 28 U.S.C. § 2254(d) rests in the  
5 holdings (as opposed to the dicta) of the Supreme Court as of the  
6 time of the state court decision. Williams, 529 U.S. at 412; Clark  
7 v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003).

8           In determining whether the state court's decision is  
9 contrary to, or involved an unreasonable application of, clearly  
10 established federal law, a federal court looks to the decision of  
11 the highest state court to address the merits of a petitioner's  
12 claim in a reasoned decision. LaJoie v. Thompson, 217 F.3d 663, 669  
13 n.7 (9th Cir. 2000). The federal court also looks to any lower  
14 state court decision that was examined, and whose reasoning was  
15 adopted, by the highest state court to address the merits of a  
16 petitioner's claim. See Williams v. Rhoades, 354 F.3d 1101, 1106  
17 (9th Cir. 2004).

18           Where the state court cited only state law, the federal  
19 court must ask whether state law, as explained by the state court,  
20 is "contrary to" clearly established governing federal law. See,  
21 e.g., Lockhart v. Terhune, 250 F.3d 1223, 1230 (9th Cir. 2001);  
22 Hernandez v. Small, 282 F.3d 1132, 1141 (9th Cir. 2002) (state court  
23 applied correct controlling authority when it relied on state court  
24 case that quoted Supreme Court for proposition squarely in accord  
25 with controlling authority). If the state court, relying on state  
26 law, correctly identified the governing federal legal rules, the  
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1 federal court must ask whether the state court applied them  
2 unreasonably to the facts. See Lockhart, 250 F.3d at 1232.

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4 III

5 Petitioner seeks federal habeas corpus relief from BPH's  
6 September 15, 2005 decision finding him unsuitable for parole and  
7 denying him a subsequent hearing for two years on the ground that  
8 the decision does not comport with due process. Specifically,  
9 Petitioner claims BPH's decision was not supported by "some  
10 evidence." Doc. #1 at 10-11.

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12 A

13 Under California law, prisoners like Petitioner who are  
14 serving indeterminate life sentences become eligible for parole  
15 after serving minimum terms of confinement required by statute. In  
16 re Dannenberg, 34 Cal.4th 1061, 1077-78 (2005). At that point,  
17 California's parole scheme provides that BPH "shall set a release  
18 date unless it determines that the gravity of the current convicted  
19 offense or offenses, or the timing and gravity of current or past  
20 convicted offense or offenses, is such that consideration of the  
21 public safety requires a more lengthy period of incarceration."  
22 Cal. Penal Code § 3041(b). Regardless of the length of the time  
23 served, "a life prisoner shall be found unsuitable for and denied  
24 parole if in the judgment of the panel the prisoner will pose an  
25 unreasonable risk of danger to society if released from prison."  
26 Cal. Code Regs. tit. 15, § 2402(a). In making this determination,

1 BPH must consider various factors, including the prisoner's social  
2 history, past criminal history, and base and other commitment  
3 offense, including behavior before, during and after the crime. See  
4 Id. § 2402(b)-(d).

5 California's parole scheme "gives rise to a cognizable  
6 liberty interest in release on parole" that cannot be denied without  
7 adequate procedural due process protections. Sass v. California Bd.  
8 of Prison Terms, 461 F.3d 1123, 1128 (9th Cir. 2006); McQuillion v.  
9 Duncan, 306 F.3d 895, 902 (9th Cir. 2002). It matters not that a  
10 parole release date has not been set for the inmate because "[t]he  
11 liberty interest is created, not upon the grant of a parole date,  
12 but upon the incarceration of the inmate." Biggs v. Terhune, 334,  
13 F.3d 910, 915 (9th Cir. 2003).

14 Petitioner's due process rights require that "some  
15 evidence" support BPH's decision finding him unsuitable for parole.  
16 Sass, 461 F.3d at 1125. This "some evidence" standard is  
17 deferential, but ensures that "the record is not so devoid of  
18 evidence that the findings of [the board] were without support or  
19 otherwise arbitrary." Superintendent v. Hill, 472 U.S. 445, 457  
20 (1985). Determining whether this requirement is satisfied "does not  
21 require examination of the entire record, independent assessment of  
22 the credibility of witnesses, or weighing of the evidence." Id. at  
23 455. Rather, "the relevant question is whether there is any  
24 evidence in the record that could support the conclusion reached by  
25 the disciplinary board." Id. at 455-56.

26 Due process also requires that the evidence underlying  
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1 BPH's decision have some indicium of reliability. Biggs, 334 F.3d  
2 at 915; McQuillion, 306 F.3d at 904. Relevant to this inquiry is  
3 whether the prisoner was afforded an opportunity to appear before,  
4 and present evidence to, BPH. See Pedro v. Oregon Parole Bd., 825  
5 F.2d 1396, 1399 (9th Cir. 1987). If BPH's determination of parole  
6 unsuitability is to satisfy due process, there must be some reliable  
7 evidence to support the decision. Rosas v. Nielsen, 428 F.3d 1229,  
8 1232 (9th Cir. 2005).

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10 B

11 Petitioner claims BPH's finding that he was unsuitable for  
12 parole violated his due process rights because it is not supported  
13 by "some evidence." Doc. #1 at 10-11. Petitioner is mistaken.

14 As an initial matter, the Court notes the record shows  
15 BPH afforded Petitioner and his counsel an opportunity to speak and  
16 present Petitioner's case at the hearing, gave them time to review  
17 documents relevant to Petitioner's case and provided them with a  
18 reasoned decision in denying parole. Doc. #4-1 at 38-43; Doc. #4-2  
19 at 40-46.

20 The record also shows BPH relied on several circumstances  
21 tending to show unsuitability for parole and that these  
22 circumstances formed the basis for its conclusion that Petitioner  
23 was "not suitable for parole and would pose an unreasonable risk of  
24 danger to society or a threat to public safety if released from  
25 prison." Doc. #4-2 at 40; see Cal. Code Regs. tit. 15, § 2402(a)  
26 (stating that a prisoner determined to be an unreasonable risk to  
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1 society shall be denied parole).

2 First, regarding the commitment offense, BPH noted:

3 the offense was carried out in a very callous  
4 manner. [] [T]here were multiple victims, and  
5 the victims were abused during this offense  
6 because they were robbed, and then they were  
7 forced into a van with apparently four men,  
8 [Petitioner] being one of them. And  
9 [Petitioner], according to the victims and  
10 corroborated by one of his crime partners, told  
11 them to take off their clothes because he was  
12 going to fuck them. Whether or not a hand was  
laid on them, that was abusive. Those women  
were terrified. There's no doubt about it.  
This was a horrible crime. It was a crime where  
these young women had absolutely no ability to  
protect themselves. They were outnumbered, and  
they were quite clearly going to be sexually  
abused had not the police already been called  
and proceeded on their behalf before they were  
raped.

13 Doc. #4-2 at 41; see Cal. Code Regs. tit. 15, § 2402(c)(1)(A) & (C)  
14 (listing that "multiple victims were attacked, injured or killed in  
15 the same or separate incidents" and "the victim[s] [were] abused,  
16 defiled or mutilated during or after the offense" as factors tending  
17 to show the commitment offense demonstrates an unsuitability for  
18 parole).

19 Second, BPH noted Petitioner's previous "history of law  
20 enforcement contact related to domestic violence issues in  
21 particular. . . . [Petitioner] indicated . . . today that there were  
22 fights with the wife and he indicated to the probation officer in  
23 discussing this arrest that he had hit her. Also, notably she  
24 stabbed him." Doc. #4-2 at 41-42; see Cal. Code Regs. tit. 15, §  
25 2402(c)(3) (listing "unstable social history" defined as "a history  
26 of unstable or tumultuous relationships with others" as factors  
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1 tending to show unsuitability for parole).

2 Third, BPH noted Petitioner's inability to control his  
3 anger and his resulting need for continued participation in self-  
4 help so that he could "understand and cope with stress in a non-  
5 destructive manner." Doc. #4-2 at 44.

6 BPH also considered other factors tending to support  
7 suitability for parole including that Petitioner: (1) completed his  
8 General Educational Development while incarcerated; (2) had a  
9 marketable skill; (3) had been involved in substance abuse  
10 programming since about 1989; and (4) planned on residing with his  
11 mother and stepfather should he be paroled. Doc. #4-2 at 42-43.

12 The state superior court affirmed the decision of BPH to  
13 deny Petitioner parole, finding that it was supported by "some  
14 evidence." Doc. #4-3 at 2-4. The court noted:

15 there is some evidence to support the Board's  
16 finding that multiple victims were attacked in  
17 the same incident [Citation]. The Board also  
18 found that the offense was carried out in 'a  
19 very callous manner[.]' [Citation]. There is  
20 some evidence to support the finding that the  
21 offense was carried out in manner [sic] that  
22 demonstrates an exceptionally callous disregard  
23 for human suffering[.] [Citation]. An  
24 'exceptionally callous disregard for human  
25 suffering' means the offense in question must  
26 have been committed in a more aggravated or  
27 violent manner than that ordinarily shown in the  
28 commission of that offense. [Citation]. Here,  
the two female victims were outnumbered by five  
male attackers. The victims were ordered to  
take off their clothes and threatened with  
sexual assault.

The record reflects that the Board relied  
on additional factors in denying parole, and  
there is some evidence to support that decision.  
There is some evidence that petitioner is  
unsuitable for parole due to his 'history of

1           unstable or tumultuous relationships with  
2           others[.]' [Citation]. The record reflects  
3           that the petitioner 'has a history of law  
4           enforcement contact related to domestic violence  
5           issues[.]' [Citation]. In determining  
6           suitability, the Board may consider 'all  
7           relevant, reliable information available[.]'  
8           [Citation]. The record shows that petitioner's  
9           behavior at the parole suitability hearing was  
10          uncooperative and combative[.] [Citation].  
11          There is some evidence to support the Board's  
12          finding that Petitioner could benefit from  
13          continuing to participate in self-help to  
14          'address his anger issues and his inability to  
15          control his temper' [citation] based on his  
16          conduct at the parole suitability hearing.  
17          Although the Board commended petitioner for the  
18          positive aspects of his behavior, [it] found  
19          that this positive behavior did not outweigh the  
20          factors of unsuitability.

21          Doc. #4-3 at 3-4.

22                The state appellate court also affirmed the decision of  
23          BPH to deny Petitioner parole, in an order that stated, in its  
24          entirety:

25                    The petition for writ of habeas corpus has  
26                    been read and considered.

27                    The petition is denied. Denial of parole  
28                    may be based solely or in part upon the  
29                    particular circumstances of the inmate's  
30                    commitment offense. The record shows that the  
31                    particular circumstances of petitioner's  
32                    kidnapping-for-purpose-of-robbery offense  
33                    "exceed the minimum elements necessary to  
34                    sustain a conviction" of that offense in  
35                    numerous respects. (In re Dannenberg (2005) 34  
36                    Cal.4th 1061, 1070-1071, 1094-1095.) The record  
37                    also amply satisfies the applicable "some  
38                    evidence" standard with regard to the other  
39                    factors identified by the Board in determining  
40                    petitioner unsuitable for parole in 2005.

41          Doc. #4-5 at 2; see also Doc. #4-6 at 32. The state supreme court  
42          summarily denied Petitioner's Petition for Review. Doc. #4-7 at 2.

1           On this record, the Court finds that the state courts'  
2 rejection of Petitioner's due process claim that BPH's decision to  
3 deny him parole was not supported by "some evidence" was not  
4 contrary to, nor did it involve an unreasonable application of,  
5 clearly established federal law, and it was not based on an  
6 unreasonable determination of the facts. See 28 U.S.C. § 2254(d);  
7 LaJoie, 217 F.3d at 669 n.7; Williams, 354 F.3d at 1106. Although  
8 the state courts cited only state law in denying Petitioner's claim,  
9 both courts correctly identified the "some evidence" standard that  
10 applies under federal law; therefore this Court must determine  
11 whether the state courts applied the standard unreasonably to the  
12 facts. Doc #4-3 at 2; see Lockhart, 250 F.3d at 1232.

13           The record shows that BPH had some reliable evidence to  
14 support its finding of unsuitability. BPH observed that, as he had  
15 demonstrated in prior suitability hearings, Petitioner remained  
16 unable "to control his temper" and had to be removed from the  
17 hearing because of his "combative" and "argumentative" behavior.  
18 Doc. #4-2 at 26-27 & 44. BPH indicated that Petitioner

19           need[ed] to continue to participate in self-help  
20 in order to understand and cope with stress in a  
21 non-destructive manner . . . [and] to continue  
22 to address his anger issue and[] his inability  
23 to control his temper, as once again was  
evidenced today at this hearing. In [light] of  
his history and his continued negative behavior,  
there's no indication that he would behave  
differently if paroled.

24 Id. at 44.

25           BPH also noted Petitioner's history of domestic violence,  
26 including an incident where Petitioner hit his wife and she stabbed  
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1 him. Doc. #4-2 at 41-42. Based on these considerations, especially  
2 when viewed in conjunction with the nature of the commitment  
3 offense, which involved Petitioner and four other men kidnapping and  
4 robbing two women and threatening them with sexual assault, this  
5 Court cannot say that BPH's finding that Petitioner was unsuitable  
6 for parole was "without support or otherwise arbitrary." See Hill,  
7 472 U.S. at 457.

8           Given the evidence before the Court, BPH reasonably  
9 concluded that Petitioner was not yet suitable for parole. See,  
10 e.g., Rosas, 428 F.3d at 1232-33 (upholding denial of parole based  
11 on gravity of offense and the petitioner's psychiatric reports  
12 documenting his failure to complete programming while in prison);  
13 Biggs, 334 F.3d at 916 (upholding denial of parole based on gravity  
14 of offense and the petitioner's conduct prior to imprisonment);  
15 Morales v. California Dep't. of Corrections, 16 F.3d 1001, 1005 (9th  
16 Cir. 1994), rev'd on other grounds, 514 U.S. 499 (1995) (upholding  
17 denial of parole based on the cruel nature of offense, the  
18 petitioner's unstable and criminal history, and his need for further  
19 psychiatric treatment). It is not up to this Court to "reweigh the  
20 evidence." Powell v. Gomez, 33 F.3d 39, 42 (9th Cir. 1994).

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IV

For the reasons set forth above, the Petition for a Writ of Habeas Corpus is DENIED.

The Clerk shall terminate any pending motions as moot, enter judgment in favor of Respondent and close the file.

IT IS SO ORDERED.

DATED

07/30/09



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THELTON E. HENDERSON  
United States District Judge